

COMMON REMEDY ISSUES IN FEDERAL SECTOR ARBITRATION

By:

**ELLIOT H. SHALLER, ESQ.
Arbitrator**

Prepared for:

Society of Federal Labor and Employee
Relations Professionals
34th Annual Symposium
Washington, D.C.
April 27, 2007

Elliot H. Shaller, Esq.
11733 Devilwood Dr.
Potomac, MD 20854
Tel: 301-294-4148
Fax: 301-576-5270
eshaller@law.gwu.edu

Copyright © 2007 by Elliot H. Shaller, Esq.

COMMON REMEDY ISSUES IN FEDERAL SECTOR ARBITRATION

ELLIOT H. SHALLER, ESQ.
Arbitrator

INTRODUCTION

In the federal sector, as in the private sector, the Arbitrator has broad discretion to fashion a remedy for a violation of a collective bargaining agreement (“CBA”); but such discretion is not unfettered. The Arbitrator exceeds his or her authority when the Arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations under applicable statutes, regulations or the terms of the CBA, or awards relief to persons who are not encompassed within the grievance.¹

REMEDIES IN PARTICULAR TYPES OF CASES

DISCIPLINE

General principles applied by Arbitrators in reviewing agency disciplinary action

For certain types of adverse actions – i.e., removals, suspensions for more than fourteen days, reductions in grade or pay, certain furlough actions – a bargaining unit employee has the option of appealing to the Merit Systems Protection Board (“MSPB” or “the Board”) or filing a grievance under the CBA.² The United States Supreme Court ruled in Cornelius v. Nutt³ that to avoid forum shopping, the Arbitrator must apply the same substantive standards that the Board would apply in such cases.

Under the Board’s decision in Douglas v. Veterans Administration,⁴ the scope of review it exercises in reviewing Agency disciplinary decisions

¹ U.S. Dep’t of Homeland Security, Customs and Border Protection and AFGE, Local 1917, 62 F.L.R.A. No. 170 (March 29, 2007) (The Arbitrator exceeded his authority in ordering a dues withholding statement for each member of the bargaining unit rather than only those employees covered by the grievance, i.e., those whose dues were improperly canceled.); AFGE, Local 2382 and U.S. Dep’t of Veterans Affairs, Carl T. Hayden Medical Center, Phoenix, AZ, 58 F.L.R.A. 270 (2002).

² 5 U.S.C. §§ 4303 and 7512.

³ 472 U.S. 648 (1985).

⁴ 5 M.S.P.B. 280 (1981).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 3 of 23

is broader than that of an appellate court. The Board explained that it functions as an independent administrative establishment within the Executive Branch, not as part of the Judicial Branch. Its review of the Agency's decision is de novo. For purposes of judicial review, the governmental act is the final order or decision of the Board, and not the Agency.⁵ Under Cornelius v. Nutt, the scope of review that the Arbitrator should exercise in these cases is presumably the same as the Board's.

In a case before the Board challenging a disciplinary action, the agency bears the burden of persuasion on three elements: 1) that the employee actually committed the alleged misconduct; 2) that there is a sufficient nexus between the misconduct and the efficiency of the service to sustain the adverse action; and 3) that the penalty imposed has been appropriately chosen for the specific misconduct involved.⁶

The Board in Douglas set forth the following list of non-exclusive factors that should be reviewed in considering the propriety of the penalty imposed by the Agency.⁷

1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2. the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. the employee's past disciplinary record;
4. the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. consistency of the penalty with those imposed upon other employees for the same or similar offense;

⁵ Id. at 286-292.

⁶ Local 2578, AFGE v. General Services Administration, 711 F. 2d 261, 265-266 (D.C. Cir. 1983).

⁷ Arbitrators are generally not required to apply the Douglas factors in those cases involving disciplinary measures that may not be appealed to the MSPB. U.S. General Services Administration Northeast and Caribbean Region New York, NY, 60 F.L.R.A. No. 160, n.2 (2005).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 4 of 23

7. consistency of the penalty with any applicable Agency table of penalties;
8. the notoriety of the offense or its impact upon the reputation of the Agency;
9. the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. potential for the employee's rehabilitation;
11. mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.⁸

Aside from determining whether discipline is warranted, absent a contractual limitation, the Arbitrator is required to determine whether the Agency properly considered the relevant factors in selecting a particular penalty, and, if it did not, to mitigate the penalty to the appropriate level. The Board recently explained how the penalty imposed by the Agency should be reviewed:

The Board will review an Agency-imposed penalty only to determine if the Agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. In making determinations regarding the reasonableness of the penalty, the Board will give due weight to the Agency's primary discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. In determining whether the Agency's penalty amounts to an abuse of discretion, the Board is required to evaluate the unique circumstances of each case. A penalty grossly disproportionate to the offense, in light of the particular circumstances of the case, is an abuse of the Agency's discretion. The Board will correct the Agency's penalty only to the extent necessary to bring it to the maximum penalty or the outermost boundary of the range of reasonable penalties.⁹

Although, as discussed above, the Board in Douglas indicated that its function was to review the Agency's disciplinary action de novo, by according such substantial deference to the Agency to select the penalty,

⁸ Douglas v. Veterans Affairs, *supra.* at 305-306.

⁹ Zazeta v. Dep't of Justice, 94 M.S.P.R. 493, 496 (2003) (citations omitted).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 5 of 23

it would appear that the Board is in fact functioning in a fashion akin to an appellate court, at least when deciding whether the penalty is appropriate. However, the Board explained that it focuses on not merely whether a penalty was too harsh or otherwise arbitrary, but also on whether it was “unreasonable,” a standard considerably broader than that used by the federal courts.¹⁰ With respect to this broader scope of review, the Board stated:

The Board’s marginally greater latitude of review compared to that of the appellate courts does not, of course, mean that the Board is free simply to substitute its judgment for that of the employing agencies. Management of the federal work force and maintenance of discipline among its members is not the Board’s function. Any margin of discretion available to the Board in reviewing penalties must be exercised with appropriate deference to the primary discretion which has been entrusted to Agency management not to the Board. Our role in this area, as in others, is principally to assure that managerial discretion has been legitimately invoked and properly exercised.¹¹

In any event, while the Agency’s decision as to what penalty to impose is entitled to deference, the Arbitrator must independently assess whether the Agency properly considered the relevant factors.

Example: The Grievant was discharged for stealing government property. Prior to this incident he had an unblemished work record. He voluntarily confessed to assisting a co-worker in stealing cash; he did not take money for himself. He pled guilty to theft of government property (a misdemeanor) and fully cooperated with the authorities in their investigation. He was sentenced to a year of probation.

The Agency notified the Grievant of its intent to discharge him. The prosecutor and the probation officer commended the Grievant for his cooperation and urged the Agency not to discharge him. But the Agency ultimately discharged the Grievant.

In his award the Arbitrator stated that the Agency had the discretion to determine the severity of the penalty, but noted that it had disregarded the prosecutor’s and the probation officer’s requests that it reconsider the discharge decision. The Arbitrator indicated that he lacked the authority to consider mitigation, and returned the matter to the Agency to reconsider in view of these requests. But he further stated that no contract violation would be found if the Agency adhered to its decision.

The Court ruled that the Arbitrator’s complete failure to consider the severity of the penalty independently, required that the matter be remanded to him for such consideration.¹²

¹⁰ Douglas v. Veterans Affairs, supra., at 300-301.

¹¹ Id. at 300-301.

¹² See Local 2578, AFGE v. General Services Administration, supra.

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 6 of 23

If the Arbitrator determines that the Agency weighed the relevant factors and its judgment did not clearly exceed the limits of reasonableness, the penalty selected by the Agency should be upheld. An Agency's position that removal is the proper penalty for any violation of its "zero tolerance" policy, without real consideration of the relevant mitigating factors and the particular circumstances of the case, may be found to be contrary to Douglas.¹³ But the Agency need not show that it considered all of the mitigating factors.

Example: A Border Patrol agent was removed from his position for testing positive in a random drug test for using illegal drugs; he was not charged with being under the influence. An Administrative Judge ("AJ") mitigated the penalty to a 60-day suspension on the basis that the Agency's application of the Douglas factors was pro forma. The AJ based this conclusion primarily on the testimony of the deciding official to the effect that the Grievant's violation was "fatal" and that a "zero tolerance" for drug offenses was the only way to ensure the integrity of the service.

The Board reversed the AJ. The Board found that the deciding official did, in fact, apply the Douglas factors. Specifically, the record showed that the Agency considered, as a mitigating factor, that the agent had worked for the Agency for six years during which time he received outstanding performance ratings. As negative factors, the Agency considered the following: that its manual advised that law enforcement employees were subject to random testing and that illegal drug use could result in removal; that the agent's drug use was in direct conflict with his drug interdiction duties and that as a law enforcement officer he was held to a higher standard; that the agent was a poor candidate for rehabilitation; that the Agency's table of penalties, recommending for a first offense involving off duty excessive use of drugs a penalty ranging from a reprimand to a suspension, was entitled to little weight because of the nature of the agent's position and the deciding official's view that the reference to drugs in the table was meant to cover the excessive use of prescription drugs, not illicit drugs.

The Board concluded that the deciding official did not mechanically apply the Douglas factors and that the decision to remove the appellant was reasonable.¹⁴

Even if the Agency considers all of the relevant factors, an Arbitrator will review how such factors were considered. If the Arbitrator determines that it considered them improperly, such as when the Agency treats certain facts as aggravating factors when they should have been treated as mitigating factors, the Arbitrator may mitigate the penalty to the maximum reasonable penalty.

Example: The employee was removed from his position as a letter carrier based on a charge that he failed to perform his duties in a safe manner. The employee had parked his vehicle on a public road while delivering the mail to a nearby

¹³ Omites v. U.S. Postal Service, 87 MSPR 223 (2000).

¹⁴ See Zazeta v. Dep't of Justice, *supra*.

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 7 of 23

house and left the motor running without setting the emergency brake. The vehicle rolled backward and hit a guardrail, sustaining \$1,500 in damages. The employee had no prior disciplinary record. The employee had recently begun taking medications to treat a medical condition that apparently contributed to his action.

In making his decision, the deciding official considered the following as aggravating factors: the conduct was serious and could have resulted in serious injury or death; the employee had been in his position for thirteen years and, in view of that tenure, should have known the correct way to operate the vehicle; the employee failed to inform the Agency that he was on prescription medication; the employee had been injured several times in the past and reasoned that “accidents can be prevented”; and the employee did not have any rehabilitative potential because of his disregard of safety procedures.

The Board held that the deciding official did not properly apply the Douglas factors in that some of the factors that he took to be aggravating, should have actually been treated as mitigating circumstances. The employee’s thirteen years of service, without prior discipline, should have been treated as a positive factor; it was illogical to treat it as a negative one based on the rationale that he “should have known better”; the fact that the accident was caused by the use of prescription medication should have been considered as a mitigating factor because he had just started using this medication and this was the first time that his performance had been adversely influenced by medication; it was erroneous to hold the prior accidents against the Grievant without evidence that they were his fault; and, contrary to the deciding official’s finding, the employee did have rehabilitative potential considering that he immediately reported the incident and took responsibility and the conduct was unintentional and the result of his having taken new medication.

The Board concluded that a five-day suspension was the maximum reasonable penalty for the misconduct.

Mitigating the discipline

When the Board sustains all the charges on which the Agency relied but concludes that the penalty imposed by the Agency exceeds the maximum reasonable penalty under the circumstances, the Board will order the Agency to cancel the penalty it imposed and substitute such penalty as it determines to be the maximum reasonable penalty for the sustained offense or offenses.¹⁵

But if fewer than all the charges are sustained, the Board will not remand to the Agency to re-consider the penalty in light of the sustained charges. Rather, the Board will select the penalty based on a “reasonable penalty” standard, rather than a “maximum reasonable” standard. This requires the Board to independently balance the relevant Douglas factors, including any statements of the deciding official concerning what penalty

¹⁵ Batten v. U.S. Postal Service, 101 M.S.P.R. 222, 227 (2006); Fulks v. Dep’t of Defense, 100 M.S.P.R. 228, 237 (2005);

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 8 of 23

would have imposed had all the charges not been sustained; however, such statements are not to be given absolute deference.¹⁶

If the Arbitrator determines that the Agency improperly removed the Grievant but that the Grievant engaged in some misconduct or was partially at fault, or that some but not all of the charges have been sustained, the Arbitrator generally has the discretion to order reinstatement without back pay or full back pay.¹⁷ But in deciding whether to deny back pay for the full time period between the removal and the reinstatement, the Arbitrator must analyze whether such a penalty is consistent with what the maximum reasonable penalty would be by virtue of applying the Douglas factors. In other words, the amount of back pay denied cannot purely be a function of how long it took to adjudicate the matter. The Board has explained that such an alternative punishment without articulation of a reasonable basis for a suspension of such duration “is determined by accident and not by a process of logical deliberation and decision.”¹⁸

Thus, the Arbitrator must apply the Douglas factors not only in determining whether the employee should have been removed, but also, in determining whether and how much back pay should be awarded.

Example: An employee was charged with sleeping on the job and being AWOL and removed from his position. The Arbitrator sustained the charges, but concluded that the Grievant should be reinstated based on several mitigating factors he deemed to exist by virtue of his application of the Douglas factors. The Arbitrator ordered reinstatement without back pay, resulting in the equivalent of a suspension of twenty months, which was the period of time that elapsed from the date of removal to the date of the reinstatement pursuant to the award.

The Board found that the Arbitrator improperly based the length of the suspension that was to be substituted for the removal on the length of time taken to adjudicate the grievance instead of on analyses of the applicable Douglas factors, including a determination of the maximum reasonable penalty that could be imposed for the sustained charges. The Board independently reviewed the Douglas factors and determined that a 120-day suspension was the maximum reasonable penalty for the Grievant’s conduct.¹⁹

¹⁶ Hillen v. Dep’t of the Army, 72 M.S.P.R. 369, 374 (1996); White v. U. S. Postal Service, 71 M.S.P.R. 521 (1996).

¹⁷ See Williams v. Dep’t. of the Air Force, 7 Fed. Appx. 935 (Fed. Cir. 2001); AFGE, Local 2718 v. Dep’t of Justice, Immigration and Naturalization Service, 768 F. 2d 348 (Fed. Cir. 1985).

¹⁸ Fulks v. Dep’t of Defense, 100 M.S.P.R. 228, 237 (2005).

¹⁹ Id.

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 9 of 23

An Agency's table of penalties is only one factor to be considered in determining the appropriateness of the penalty; deviation from the table is permissible if the circumstances of the case so justify.²⁰

Exemplary punishment is generally contrary to the Douglas factors.²¹

Finally, there are a limited number of offenses for which the applicable statute prescribes the penalty to be assessed. For example, 31 U.S.C. § 1349(b), states that a 30-day suspension is the minimum penalty for the misuse of an official government vehicle. Such a penalty prescribed by statute may not be mitigated.²²

MANAGEMENT RIGHTS

Under 5 U.S.C. § 7106(a), the Agency retains the right, among others, to: determine the budget and number of employees; hire, assign, direct, layoff, and retain employees; suspend, remove, reduce in grade or pay; and to make selections for appointments from among properly ranked and certified candidates for promotion or any other appropriate source. Under 5 U.S.C. § 7106(b), the Union and the Agency may negotiate procedures which management will observe in exercising such rights and "appropriate arrangements" for employees adversely affected.

Remedies issued by Arbitrators in federal sector cases may potentially impact the exercise of the Agency's management rights under the statute. In ruling on an exception alleging that an arbitration award violates management's rights, the Federal Labor Relations Authority ("the FLRA" or "the Authority") first determines whether the award affects a management right under § 7106(a). If so, then the Authority will sustain the award if it satisfies a two-prong test.

Under prong 1, the award must provide a remedy for a violation of applicable law within the meaning of 7106(a) of the statute, or of a CBA negotiated pursuant to 7106(b). With respect to a violation of a CBA provision, the Authority assesses whether it: constitutes an "arrangement" under § 7106(b)(3); and "excessively interferes" with the exercise of a

²⁰ See Williams v. Dep't of the Air Force, 32 M.S.P.R. 347 (1987).

²¹ Blake v. Dep't of Justice, 81 M.S.P.R. 394, 418 (1999).

²² Madrid v. Dep't of Interior, 37 M.S.P.R. 418 (1988).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 10 of 23

management right.²³ The provision constitutes an arrangement within the meaning of § 7106(b)(3) if it is intended to ameliorate the adverse effects flowing from the exercise of a management right.²⁴ A provision “excessively interferes” with a management right if the benefits it affords employees are outweighed by the intrusion on the exercise of management’s rights.²⁵ If such excessive interference is found, the award will be deemed deficient as having failed on prong 1.

Under prong 2, the remedy must reflect a reconstruction of what management would have done if it had not violated the law or contractual provision. If prong 1 but not prong 2 is satisfied, the Arbitrator may cancel the Agency’s action, but may not order what action the Agency must take; it must remand the matter to the Agency to reconsider its decision in compliance with the applicable law or CBA provision.²⁶ The Authority’s rationale for this approach is to ensure that an Agency’s rights are limited only to the extent to which the parties have bargained.²⁷

Application of the two prong tests often arises in the context of grievances challenging selection decisions and performance ratings.

Selection Cases

An award requiring an Agency to make a selection for an appointment affects management’s right to “make selections for appointments from-- (i) among properly ranked and certified candidates for promotion; or (ii) any other appropriate source.”²⁸ Accordingly, the 2-prong test applies to arbitration awards issued in such cases.²⁹ Thus, the

²³ At one time the standard the FLRA applied in determining whether an Arbitrator’s enforcement of the provision was authorized was whether it “abrogated” a management right. In U.S. Dep’t of Justice Federal Bureau of Prisons Federal Transfer Center Oklahoma City, OK, 58 F.L.R.A. 109 (2002), the Authority changed this standard and stated that it would instead examine whether the provision, as interpreted and applied by the Arbitrator, “excessively interferes” with the exercise of a management right.

²⁴ Federal Aviation Administration, Washington, D.C., 55 F.L.R.A. 1233, 1236-1237 (2000).

²⁵ Federal Bureau of Prisons Federal Transfer Center, supra., at 111.

²⁶ United States Dep’t of the Treasury, Bureau of Engraving & Printing, Washington, D.C. 53 F.L.R.A. 146, 151-54 (1997) (“the BEP Case”); See also U. S. Dep’t. of the Treasury Internal Revenue Service Greensboro, North Carolina, 61 F.L.R.A. No. 20 (2005).

²⁷ Social Security Administration, Boston Region (Region 1), Lowell Dist. Office, Lowell, MS., 57 F.L.R.A. 264, 269-270 (2001)

²⁸ 5 U.S.C. §7106(a)(2)(C).

²⁹ U.S. Department of the Treasury, Internal Revenue Service, Small Business/Self Employed Business Division Compliance Area 6 and NTEU, Chapter 74, 61 FLRA 757 (2006).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 11 of 23

Arbitrator should not order that the Grievant be selected for a position based solely on a finding that the Agency did not comply with certain procedural requirements in the CBA, which may have prejudiced the Grievant (i.e., prong 1). To justify the issuance of a remedy requiring that the Grievant be selected, the Arbitrator must be able to reconstruct what would have occurred had the procedures in the CBA been followed, and find that if they were, the Grievant would have been selected (i.e., prong 2).³⁰ Proving that the Grievant would have been selected “but for” the breach of contract is often difficult especially if there are other candidates on a “best qualified” or equivalent list and and/or if the selecting official testifies that others were deemed more qualified. Nevertheless, in certain cases, the record supports such a finding.

Example: The Grievant had been employed by the Agency as a Program Analyst for 34 years and had been a GS-12 for the last 27 years. He applied for one of three vacancies for a GS-13 Program Analyst and was placed on the Best Qualified (“BQ”) List. The CBA required the selecting official to give “serious consideration” to grade-stagnated candidates. The selecting official contacted the supervisor for the Grievant and the other individuals on the BQ list and discussed all of the candidates except the Grievant and told the Grievant that he did not review his application in making the selections.

The Arbitrator found that the Agency breached the “serious consideration” provision of the CBA. Further, in the award, the Arbitrator compared with specificity the Grievant’s qualifications with those of the selectees under the weights and factors used to rate applicants for the BQ list and the criteria used by the selecting official. He found that the Grievant was substantially more qualified than the selectees and that had he been seriously considered as required by the CBA, he would have been selected. In view of these findings, the Authority concluded that the award satisfied both prong 1 and prong 2.³¹

If prong 1 but not prong 2 is shown, typically the appropriate remedy is for the Arbitrator to order that the Grievant be given priority consideration for the next selection or to remand the matter to the Agency to conduct a reselection in compliance with the CBA requirements.

Example: The Arbitrator sustained the grievance of several employees over their failure to be promoted. He ruled that the Agency committed a statutory violation as well as a violation of the CBA but found that it was impossible to determine whether the Grievant would have been promoted if the statutory and contract violations had not occurred. The Arbitrator awarded the Grievant priority consideration in all future promotion vacancies to which they were eligible until they were appointed to the next higher grade. The Authority sustained the Arbitrator’s award because application of prong 2 precluded prospective promotions as a

AFGE, Council 220 and Social Security Administration Region VI, Dallas, TX, 54 F.L.R.A. 1227, 1235 (1998).

³⁰ See Social Security Administration, 61 F.L.R.A. No. 57 (2005); Social Security Administration Woodlawn, MD, 54 F.L.R.A. 1570 (1988).

³¹ Id.

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 12 of 23

connection between the Agency's violation of the CBA and the failure to be promoted was not established.³²

Performance Ratings

In evaluating employees, management is exercising the right to direct employees and assign work under the management rights provision set forth in 5 U.S.C. 7106(a)(2)(A). Accordingly, the two-prong test applies in determining whether an arbitration award requiring that a performance rating be changed will be upheld.

Prong 1 requires a determination that the Arbitrator has found that the Agency did not apply the established standards, or applied the standards in a way that violates a law, regulation or the CBA. If the Arbitrator so finds, he or she may issue a remedy ordering the Agency to cancel the rating. Prong 2 requires a determination that the Arbitrator, based on the record, reconstructed what the rating would have been had the correct standard been applied and applied properly. If so, the Arbitrator may order management to grant such rating. If not, the Arbitrator must remand the matter to the Agency for a reevaluation.³³

Remedies impacting management rights awarded pursuant to a statute

The requirement under prong 2 that the Arbitrator's remedy reflect a reconstruction of what would have occurred absent the statutory or contract violation is inapplicable when the remedy is made pursuant to applicable law. For example, an Arbitrator may lawfully award a remedy directing relief that is provided for by Title VII, irrespective of whether such a remedy affects a management right but fails to reflect a reconstruction of what management would have done absent the statutory violation.³⁴

Example: To remedy a finding of sexual harassment, the Arbitrator ordered a variety of remedies designed to protect the Grievant who he found had been

³² See Defense Security Assistance Development Center, 60 F.L.R.A. No. 63 (2004). See also Social Security Administration and AFGE, Local 2258 (Ed. W. Bankston, Arb., February 15, 2007) (Where the Agency violated the CBA's requirement that it accord fair and equitable treatment by including other candidates on the well-qualified list eligible for promotion based on certain awards they had received but failing to consider similar awards the Grievant had received and, as a result of such failure, excluded her from the well-qualified list, the Arbitrator ordered that the Grievant be given priority consideration for future promotions.)

³³ See BEP, supra.

³⁴ U.S Dep't of Justice Federal Bureau of Prisons Metropolitan Detention Center Guaynabo, PR, 59 F.L.R.A. 787 (2004).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 13 of 23

harassed by her supervisor. These remedies included a prohibition against the supervisor supervising the employee and a requirement that he remain at least ten feet away from her at all times and only speak to her regarding work-related matters. The Agency contended that these remedies were deficient because they did not reflect a reconstruction of what management would have done if it had not violated Title VII. The Authority ruled that when an Arbitrator issues a remedy for a violation of an applicable law such as Title VII, which provides for a remedy that affects management's rights, it is not appropriate to apply prong 2 to assess whether the remedy is valid; rather, the appropriate inquiry is whether the relevant applicable law provides the remedy.³⁵

MONETARY AWARDS

A monetary award may not be issued against the federal government in the absence of a specific waiver of sovereign immunity. The statutes that most commonly come into play in the federal sector, and which are deemed to waive sovereign immunity, are the Back Pay Act, the Civil Rights Act, and the Fair Labor Standards Act ("FLSA"). The types of monetary awards that may be available, depending on the statute involved, include primarily back pay, compensatory damages and attorney's fees.

Back Pay

The "But For" Test

The Back Pay Act authorizes an award of back pay to remedy an unjustified or unwarranted personnel action if certain conditions are met. The Act states, in pertinent part:

(b)(1) An employee of an Agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to ... a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period³⁶

³⁵ Id.

³⁶ 5 U.S.C. 5596

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 14 of 23

Under the above provision, the Arbitrator may award back pay if two conditions are met: 1) the aggrieved employee was affected by an unjustified or unwarranted personnel action, such as a violation of the CBA³⁷; and 2) the personnel action has resulted in the withdrawal or reduction of the Grievant's pay, allowances or differentials. Thus, back pay is not warranted solely on the basis that there has been a violation of the CBA. The "but for" test also must be met -- it must also be shown that "but for" the unjustified or unwarranted personnel action, the employee would have obtained the monetary relief being awarded.³⁸

Examples:

1) The Arbitrator sustained a grievance alleging that the Agency violated the CBA's requirement that overtime be distributed equitably in violation of the CBA. But the Arbitrator was unable to identify specific overtime assignments that were denied to the Grievant as a result. The Arbitrator properly issued a "cease and desist" order, and declined to award back pay.³⁹

2) The Arbitrator sustained a grievance alleging that the Grievant was denied overtime that she would have worked but for the fact that she was improperly not considered to be part of a certain work group, for which she had volunteered to work overtime. The Authority upheld the Arbitrator's award of back pay because of the finding that but for the CBA violation, such overtime would have been worked. (The Authority also rejected the Agency's contention that it was improper to award overtime compensation for time that was not actually worked.)⁴⁰

2) A back pay award was inappropriate where the Arbitrator found that the Grievant was discriminated against in being considered for a promotion, but failed to find that 'but for' the Agency's discrimination, the Grievant would have been selected. The proper remedy is priority consideration for the next vacancy.⁴¹

3) Where the Agency violated a provision of the CBA requiring that a certain amount of advance notice of a reduction of force be provided, but there was no

³⁷ Federal Bureau of Prisons, Federal Correctional Complex, 59 FLRA 466 (2003).

³⁸ See National Labor Relations Board Washington, D.C., 61 F.L.R.A. No. 31 (2005); U.S. Dep't of Health and Human Services, 54 F.L.R.A. 1210, 1218-19 (1998).

³⁹ See U.S. Dep't of the Navy Naval Surface Warfare Center Indian Head Division, 60 F.L.R.A. No. 108 (2004).

⁴⁰ U.S. Department of the Navy, Puget Sound Naval Shipyard, and Intermediate Maintenance Facility, Bremerton, Wash. and Bremerton Metal Trades Council, IBEW Local 574, 62 FLRA 4 (2007).

⁴¹ See Department of Health and Human Services Social Security Administration, 30 F.L.R.A. 562 (1987).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 15 of 23

showing that the Grievant lost any pay as a result of the shortened notice, there was no basis for awarding back pay.⁴²

4) Where the Arbitrator found that the Agency violated the CBA by not meeting with the Grievant and providing information as to how she may get a higher performance rating, but failed to find a monetary loss as a result, the Arbitrator erred in awarding Grievant damages in the amount of one percent of her annual salary, on the basis that she suffered the loss of a potential monetary award.⁴³

5) An award of back pay was appropriate where the Arbitrator determined that the Agency violated the CBA in failing to process performance awards in a timely manner and that such action resulted in the withholding of awards for certain employees.⁴⁴

Back pay includes all benefits of employment, i.e., hospital bills and expenses that would have been paid by health insurance, restoration of seniority, vacation that would have accrued, and any pay increases that would have been received. The Agency is not required however to pay for accrued annual leave. Rather, the Agency is required to restore annual leave to the employee's account.⁴⁵

As a practical matter, it is unusual for Arbitrators to become involved initially in issues regarding the details of calculation of a back pay award. Rather, most awards typically provide simply for the matter to be remanded to the Parties with instructions to determine the amount of back pay that should be provided. Jurisdiction is sometimes retained to resolve any lingering, unresolved disputes as to the calculations.

Mitigation of back pay

An Arbitrator is not precluded by the Back Pay Act from denying back pay as part of a mitigated remedy, such as when it is determined that the penalty of removal was not justified, but that the employee was at fault, and the penalty is mitigated to a suspension.⁴⁶

The Grievant must attempt to reasonably mitigate damages by seeking other employment. A failure to do so may result in the back pay

⁴² See U.S. Department of the Interior Bureau of Indian Affairs Office of Indian Educational Programs, Flandreau Indian School Flandreau, SD, 55 F.L.R.A. 59 (1999).

⁴³ See U.S. Department of the Air Force Warner Robins Air Force Base, GA, 56 F.L.R.A. 541 (2000).

⁴⁴ NLRB, Washington, D.C. supra.

⁴⁵ Bullock v. Dep't of the Air Force, 80 M.S.P.R. 361, 373, n. 10 (1998).

⁴⁶ AFGE, Local 2718 v. Dep't. of Justice, Immigration and Naturalization Service, 768 F. 2d 348 (Fed. Cir. 1985); U.S. Dep't. of Veterans Affairs Medical Center, Coatesville, PA, 53 F.L.R.A. 1426, 1431 (1998).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 16 of 23

award being denied or limited. Further, back pay is reduced by the amount of unemployment compensation or other earnings the employee has for the applicable period.⁴⁷ Overtime earnings and bonuses earned from other employment are only deducted to the extent that it replaces earnings the Grievant would have received in his or her original position.⁴⁸

⁴⁷ Deskin v. U. S. Postal Service, 81 M.S.P.R. 684 (1999).

⁴⁸ Rogerson v. Dep't. Transportation, 35 M.S.P.R. 270, 272 (1987).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 17 of 23

Retroactivity of the back pay award

Under 5 U.S.C. 5596(b)(4), the back pay period may not extend back for a period “beginning more than six years before the date of the filing of a timely appeal.” This provision establishes the earliest date from which a back pay award may commence; it does not indicate when the back pay period must end.⁴⁹

In a failure to promote case, if the Arbitrator determines that the Grievant would have been promoted “but for” the violation of the CBA and orders the Grievant promoted into the position, the remedy should typically include back pay commencing on the date that the selectee entered the job and ending on the date that the Grievant enters the job.⁵⁰

The Arbitrator has discretion to limit the back pay period to the time period beginning with the filing of the grievance or to the contractual time period for filing a grievance, such as based on a finding that the grievance could have and should have been filed earlier.⁵¹

Interest

A back pay award issued pursuant to the Back Pay Act must include interest.⁵² Interest is applicable to monetary awards only and not to leave or other benefits.⁵³

Front pay

The Back Pay Act does not authorize an award of front pay.⁵⁴ In discrimination cases it has been held that reinstatement is preferred as a remedy to front pay, but that front pay may be awarded in lieu of reinstatement in three situations: 1) where no position is available; (2)

⁴⁹ U.S. Department of Transportation Federal Aviation Administration Airways Facility Service National Airway Systems Engineering Division Oklahoma City, OK, 60 F.L.R.A. No. 112 (2005).

⁵⁰ U.S. Department of the Treasury, Internal Revenue Service Large and Mid-Size Business Division Omaha, NE, 60 F.L.R.A. No. 141 (2005).

⁵¹ U.S. Dep’t. of Defense Commissary, 49 F.L.R.A. 1211 (1994).

⁵² 5 U.S.C. §5596(b)(2)(A).

⁵³ Rivas v. U.S. Postal Service, 76 M.S.P.R. 584, 586 (1997).

⁵⁴ See Social Security Administration Branch Office, East Liverpool, OH 54 F.L.R.A. 142 (1998) .

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 18 of 23

where a subsequent working relationship between the parties would be antagonistic; or (3) where the Agency has a record of long-term resistance to anti-discrimination efforts.⁵⁵

FLSA Cases

The Back Pay Act is inapplicable to cases arising under the Fair Labor Standards Act ("FLSA"). In these cases the monetary award is limited to the monetary damages authorized by that statute, i.e., unpaid wages plus an equal amount as liquidated damages, unless the Agency demonstrates that it acted in good faith. The back pay period in FLSA cases is two years, and three years in cases of "willful" violations.⁵⁶ (Arguably in FLSA cases the statute of limitations set forth in that statute, rather than any time period set forth in the grievance procedure of the CBA, applies in determining when the grievance must be filed.⁵⁷)

Compensatory Damages

Compensatory damages are unavailable under the Back Pay Act but are, by virtue of the Civil Rights Act of 1991, available in discrimination cases alleging a violation of Title VII or the Rehabilitation Act. For agencies with more than 500 employees, the cap on compensatory damages in such cases is \$300,000.⁵⁸

Types of Compensatory Damages

There are the following three types of compensatory damages that may be recovered.⁵⁹

1. Past Pecuniary – These are the quantifiable out of pocket expenses incurred as a result of the discrimination, i.e., job-hunting expenses, moving expenses, medical expenses. Under the collateral source rule, the Grievant is entitled to the full amount of pecuniary damages, even if some of the medical expenses were paid by health insurance.⁶⁰

⁵⁵ Clark v. Potter, Postmaster General, U.S. Postal Service, EEOC DOC 01A21594 (2003).

⁵⁶ NTEU and Federal Deposit Insurance Corporation, 53 F.L.R.A. 1469 (1998).

⁵⁷ Id.

⁵⁸ 42 U.S.C. § 1981a.

⁵⁹ See Generally Santiago v. Caldera, EEOC DOC 01955684 (1998).

⁶⁰ Wallis v. U.S. Postal Service, EEOC DOC 01950510 (1995).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 19 of 23

2. Future Pecuniary – These are the out of pocket expenses that the employee will likely continue to accrue after the case is resolved (i.e., ongoing therapy). Entitlement to such compensation is more difficult to prove. Generally, the employee must document the expected nature, extent and duration of future medical visits.⁶¹
3. Nonpecuniary – These are damages for losses that are not subject to precise quantification, i.e., emotional pain, suffering, injury to professional standing, injury to character and reputation, injury to credit standing. (Damages allegedly arising from the stress involved in pursuing the EEOC process is not compensable.)

Amount of compensatory damages

The amount of compensatory damages award must: 1) not be “monstrously excessive”; and 2) be consistent with similar cases.⁶²

Examples:

- 1) An award of \$125,000 in nonpecuniary damages was deemed appropriate considering that the Grievant’s removal caused severe psychological injury, resulting in substantial physical discomfort, including digestive problems.⁶³
- 2) An Award of \$75,000 was deemed appropriate based on the deterioration of the Grievant’s medical and emotional condition, including aggravation of asthma, panic attacks, insomnia, digestive problems, social withdrawal and loss of libido⁶⁴;
- 3) An Award of \$100,000 was deemed appropriate based on the Grievant’s severe psychological injury lasting for more than four years and which was expected to continue, including, depression, concern for physical safety, lethargy, social withdrawal, damaged marriage, stomach distress and headaches.⁶⁵

Pre existing conditions

The Agency is only required to compensate the employee for treatment rendered for harm caused by the discrimination. Where the complaining party has a pre-existing condition that deteriorated as a result

⁶¹ Smith v. Perry, EEOC DOC 01943844 (1996).

⁶² Leperi v. Glickman, EEOC No. 01964107 (1998).

⁶³ See Santiago v. Caldera, *supra*.

⁶⁴ See Carpenter v. Glickman, EEOC DOC 01945652 (1995)

⁶⁵ See Finlay v. Runyon, EEOC DOC 01942985 (1997)

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 20 of 23

of the discrimination, the additional harm may be attributed to the Agency. The burden is on the Agency to establish the extent of the damages that the pre-existing condition would have caused in such circumstances.⁶⁶

Proving compensatory damages

There must be objective evidence of damages. This may include: statements from the Grievant concerning his/her emotional pain or suffering, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other nonpecuniary losses; statements from others, including family members, friends, and health care providers, regarding the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, fatigue, or a nervous breakdown. Objective evidence may also include documents reflecting the Grievant's actual out-of-pocket-expenses related to medical treatment, counseling, and so forth, and any injury allegedly caused by the discrimination.⁶⁷

Evidence of physical and emotional damages from a physician or medical provider is not required, although that may increase the probability that compensatory damages will be awarded or increase the amount of the award.⁶⁸ Further, if an employee declines to execute appropriate releases to permit discovery of relevant medical and/or mental health records, the Arbitrator may draw an adverse inference.

Attorney's Fees

An Arbitrator may only award attorney's fees if they are specifically authorized by statute or the CBA.⁶⁹ Attorney's fees are specifically authorized by the Back Pay Act,⁷⁰ the Civil Rights Act of 1991⁷¹ and the Whistleblowers Protection Act.⁷²

⁶⁶ Sloan v. U.S. Postal Service, 77 M.S.P.R. 58, 74 (1997).

⁶⁷ Lawrence v. Runyon, EEOC No. 01952288 (1996).

⁶⁸ Carpenter v. Glickman, *supra*.

⁶⁹ U.S. Department of the Navy Naval Surface Warfare Center Indian Head Division, *supra*; U. S. Dep't of Veterans Affairs Veterans Integrated Service Network 7 Network Business Office Duluth, GA, 60 F.L.R.A. 122 (2004).

⁷⁰ 5 U.S.C. 5596(b)(1)(A)(ii)

⁷¹ 42 U.S.C. 2000e-5(k)

⁷² 5 U.S.C. 1221(g)(2)

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 21 of 23

Fee Awards Under the Back Pay Act

Attorney's fees may be awarded under the Back Pay Act if: a back pay award is issued; the Grievant is the "prevailing party"; the award of fees is warranted "in the interest of justice"; and the amount of the fees are reasonable.⁷³

Prevailing party – Total victory is not necessary in order to be considered the prevailing party; the key is whether the Grievant has obtained substantially all of the relief sought. If the Grievant is found to have committed the offense charged but the penalty is reduced, he may be deemed to have prevailed.⁷⁴ Where the grievance is resolved by a settlement agreement favorable to the employee, the employee may be considered the "prevailing party."⁷⁵

Interest of justice – The Arbitrator has considerable discretion in determining whether the "interest of justice" criterion has been met. Circumstances that may be considered include:

- Whether the Agency engaged in a prohibited personnel practice;
- Whether the Agency's action is clearly without merit or wholly unfounded, or the employee is substantially innocent of the charges;
- Whether the Agency initiated the action in bad faith, including to harass the employee or exert improper pressure on the employee to act in a certain way;
- Whether the Agency committed a gross procedural error which prolonged the proceeding or severely prejudiced the employee;
- Whether the Agency knew or should have known that it would not prevail on the merits;
- Where the Agency presents little or no evidence to support its actions or demonstrates either a lack of or negligent preparation;
- Where the Agency's ill will, or negligence, tainted the action against the employee to an unconscionable degree;

⁷³ 5 U.S.C. 5596(b), 7701(g); see Allen v. United States Postal Service, 2 M.S.P.R. 420 (1980).

⁷⁴ See Sterner v. Department of the Army, 711 F. 2d 1563 (Fed. Cir. 1983); see Dunn v. Department of Veterans Affairs, 98 F. 3d 1308 (Fed. Cir. 1996) (Grievant was the prevailing party where removal is mitigated to 30-day suspension).

⁷⁵ Griffith v. Department of Agriculture, 96 M.S.P.R. 251 (2004) (Employee is the prevailing party where a removal based on misconduct is, as a result of a settlement agreement, cancelled and changed to a removal based on a medical inability to perform job functions.)

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 22 of 23

- Where the Agency initiated action against an employee in disregard of prevailing law, regulations or a negotiated agreement; and
- Where the employee is ultimately found to be substantially innocent of the Agency's charges.⁷⁶

Example: The Grievant was suspended for 14 days for disorderly conduct and providing a false statement during an official inquiry. The Arbitrator found just cause to discipline the Grievant for the first charge, but not the second. He stated that because the Agency did not apply the rules of progressive discipline and the Douglas factors pursuant to the CBA, the penalty should be mitigated to a letter of warning. The Union sought attorney's fees.

The Arbitrator found that the Grievant was the "prevailing" party because one of the charges was dismissed and the discipline was substantially reduced. Further, the Arbitrator concluded that the "interests of justice" criterion was met. He reasoned that the Agency neither applied progressive discipline nor the Douglas factors as required by the CBA and that its conduct of the investigation was negligent; it therefore knew or should have known that it would not prevail. Moreover, he found that the Agency acted in bad faith in bringing charges against the Grievant to exert improper pressure on a Union officer. The Authority upheld the Arbitrator's award.⁷⁷

The Arbitrator must provide a fully articulated, reasoned decision granting or denying the request for attorney fees. The decision must contain independent and specific analysis, findings, and conclusions on each pertinent statutory requirement including the reasonableness of the amount of fees when fees are awarded.

Discrimination, Whistleblower Protection Act, and Uniformed Services Employment and Reemployment Rights Act ("USERRA") Cases

In discrimination and whistleblower cases, the applicable statutes provide for the recovery of attorney's fees if the Grievant is the prevailing party. Unlike Back Pay Act cases, it is not necessary to also show that the fee is warranted in the interest of justice.⁷⁸

The attorney fee provision of USERRA does not require a finding that a fee award is in the interest of justice or that the Grievant is the prevailing party. Rather, it authorizes a fee award if the Board grants any corrective action for a violation of the Act.⁷⁹

⁷⁶ Id.; see Naval Air Development Center, 21 F.L.R.A. 131 (1986); U.S. General Services Administration, *supra*.

⁷⁷ See General Services Administration, *supra*.

⁷⁸ Federal Deposit Insurance Corporation, 45 F.L.R.A. 437 (1992).

⁷⁹ 38 U.S.C. § 4324(c)(4). See Glassman v. Department of Labor, 101 M.S.P.R. 373 (February 15, 2007).

Common Remedy Issues in Federal Sector Arbitration

By: Elliot H. Shaller, Esq., Arbitrator

Page 23 of 23

Amount of the Fee

To calculate the fee amount, counsel's reasonable (i.e., market) hourly rates are multiplied by the amount of hours reasonably expended to arrive at a "lodestar" figure. The lodestar amount may be adjusted to account for various factors, such as, contingency fee arrangements, where there is a risk of no or partial payment, the difficulty of the case, and extensive experience of counsel which may not be reflected in the hourly rate.⁸⁰

The amount of attorney's fees must be reasonable and the Arbitrator must articulate the basis upon which the determination of reasonableness of the fees was made. The Arbitrator must justify any reduction in the award from the amount requested by setting forth detailed findings concerning which of the hours were expended unreasonably.⁸¹

Union attorneys may receive awards based on the lodestar method (and are not limited to the cost method) if the attorneys are not required to compensate the Union for fees awarded in excess of costs.⁸²

Costs

The Arbitrator may not assess on one party absent an authorizing provision in the CBA.

⁸⁰ See Naval Air Development Center, supra.

⁸¹ Crumbaker v. Merit Systems Protection Board, 781 F. 2d 191 (Fed. Cir. 1986); Naval Air Development Center, supra.

⁸² AFGE v. F.L.R.A., 944 F. 2d 922 (D.C. Cir. 91).